IN THE

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

Ex parte Equitable Trust Company of New York, Original No. 169.

In the Matter of the Petition of The Equitable Trust Company of New York, as Trustee, for a Writ of Mandamus, Original No. 2757.

In the Matter of the Appeal of The Equitable Trust Company from the Order Issuing the Injunction, dated February 21, 1915.

## Supplemental Brief of Petitioners and Appellants.

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F. D. MONCKTON, Clerk.

By....., Deputy.

THE JAMES H. BARRY CO.

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## SUPPLEMENTAL BRIEF OF PETITIONERS AND APPELLANTS.

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**THE CONTENTION OF COUNSEL FOR RECEIVERS AND RESPONDENTS THAT, EVEN THOUGH THE LOWER COURT HAS ERRED, AND HAS EXCEEDED ITS AUTHORITY, NO REMEDY CAN BE FOUND IN THESE PROCEEDINGS, IS BASED ON A MISCONCEPTION OF THE RECORD, AND IS UTTERLY UNFOUNDED.**

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### TRUE CONDITION OF THE CAUSE.

On February 21, 1916, the lower court made an order directing that the Denver & Rio Grande be

made a party to the suit in foreclosure, in order that the guaranty of interest and sinking fund contained in "Contract B" might be enforced against that Company. This order was made in an action brought solely for the foreclosure of the Mortgage on the properties of the Western Pacific.

In addition to the authorities heretofore cited, showing that the order in question is void, we beg leave to refer the Court to the following cases:

*Towle Brothers* v. *Quinn,* 141 Cal., 385.

In this case the Court said:

> " . . . We think that in this action to foreclose a mortgage, which is based on Section 726 *et seq.* of the Code of Civil Procedure, the court had no power to reach its hands over into the separate and independent action for participation, and take control and jurisdiction of such action. It had merely jurisdiction to foreclose the mortgage sued on, and order the mortgaged premises sold, and to foreclose the rights of all parties holding under and subject to the mortgage."

In *Joy* v. *Jackson & Michigan Plank Road Company* (11 Michigan, 155), the Court held that:

> "Sureties who have undertaken, not for the payment of the mortgage debt, but that the mortgagor shall provide a *sinking fund* in certain specified securities for its payment, cannot be joined as defendants in a suit to foreclose the mortgage."

In *O'Connor* v. *Nadel* (23 Southern, 532), the Su-

preme Court of Alabama held that "a bond given to "a mortgagee on the same day the mortgage was "given, but not executed by the mortgagor, though "given to secure the same debt, is no part of the "mortgage, and those who signed the bond are not "necessary parties in an action to foreclose the mort-"gage."

The Court of Appeals for the Eighth Circuit has declared:

> "The pendency in a state or other court of an action *in personam* which involves no issue of which the federal court has acquired exclusive jurisdiction, no claim to or lien upon specific property in the possession or under the dominion of a federal court of equity, presents no ground to sustain a dependent bill to stay the action."
>
> "The subject of a suit to foreclose a mortgage is the specific property mortgaged. Its object is the subjection of all liens thereon to that of the mortgage and the application of the specific property to the payment of the mortgage debt."
>
> *Guardian Trust Co.* v. *Kansas City Sou. Ry.*, 146 Fed., 337.

In *Steele* v. *Grove* (67 N. W., 963-5), the Supreme Court of Michigan said:

> "1. The relator was not a party to the foreclosure suit. It is true that he might be made a party under the provisions of section 6704, How. Ann. St., so that an execution for deficiency might have been issued against him, as well as the mortgagor, for any balance of the debt remaining unsatisfied

after a sale of the mortgaged premises. This section of the statute does not make it mandatory upon the plaintiff to make one who is a mere endorser upon the note a party defendant in the mortgage foreclosure. The statute is simply permissive. Under the original equity jurisdiction, there was no power to make personal decree against even the mortgagor himself; but this is a statutory innovation, as is also the enforcement in the foreclosure suit of the collateral obligations of third persons, and the jurisdiction by the statute over this latter class of persons is permissive only, and not obligatory. *Johnson* v. *Shepard,* 35 Mich., 115. It is true that upon foreclosure, where one is not primarily liable upon the mortgage debt, no personal liability can be enforced against him until the land is sold and the deficiency reported. *Howe* v. *Lemon,* 37 Mich., 164."

See also:

*Johnson* v. *Shepard,* 35 Mich., 115.

There is, we submit, no doubt that the Court had no right to inject into the foreclosure proceeding an action against the Denver Company, in order that its liability for interest and sinking fund might be enforced. This, however, is exactly what the Court did. The order of February 21, 1916, was made for the purpose of bringing the Denver Company in so that the rights of the Trustee and Bondholders against that corporation to recover from it the interest and the sinking fund might be enforced in this proceeding. Though this order is void, the lower court refuses to hear the cause presented by the pleadings, or to make a decree, though the cause is ripe for

decree, the refusal being predicated on the existence of the void order. No other ground for the refusal to enter the decree forthwith has been suggested either by the Court or by the Receivers, and *it is conceded by the Court that the decree should be entered forthwith if this order be void.* The following extracts from the transcript of the proceedings annexed to the petition for mandamus demonstrate that such is the fact:

> "MR. PARTRIDGE— . . . The reason, and the only reason why the Receivers want to be heard or to object to the application of Mr. How here today, is this: That they believe that this guarantee of the Denver & Rio Grande Railroad is a mortgage upon its property, that this mortgage is prior and superior to its first and refunding Fives, and to its adjustment Sevens, and that that can be established thoroughly in this court with the proper parties before it, that that lien is superior to the lien of those two interests in the amount of $43,000,000. Furthermore, if that can be established in this court by the Receivers, or the Equitable Trust Company, that that, together with the earnings of the Western Pacific, will be more than sufficient to pay the full interest on the bonds of the Western Pacific and the sinking fund besides."

On the hearing the Court declared, in speaking of the same subject:

> "If it has jurisdiction, Mr. How, I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no

competent marshaling or fixing of the value of this property for the purpose of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never be necessary to sell the property of the Western Pacific,"

and Mr. How thereupon stated:

"That protection has not been afforded it—if it had been the mortgage of the Western Pacific would not have gone into default."

"THE COURT—That does not answer the question. *The question is what are the rights of the bondholders of the Western Pacific under that contract, and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.*"

And again the Court declared:

*"If the Court of Appeals shall determine that this Court is wrong in its view that Contract B must be interpreted here and may be disposed of like any other piece of physical property that is pledged under a mortgage there will be no difficulty at all in wiping the slate clean in a very quick and expeditious way, thus disposing of all the difficulties.* All I desire to see is that the jurisdiction of this Court is exercised in a manner so as to leave no stain on the question of its having protected those whose rights are before it for protection."

And again:

> "THE COURT—*I am inclined to think that if you take a different view from that of this Court that it should have the advice of the Circuit Court of Appeals under your application for a writ of prohibition as to whether it is right in the order it has issued bringing in the Denver & Rio Grande as a party to this action with a view of construing competently the provisions of Contract B, that that would be a very proper course to pursue.*"

The position of the lower court as shown by the record is this: The lower court has made an order directing that there be submitted to it a controversy concerning which its jurisdiction has not been invoked by the parties. It has declined to enter a decree in the cause submitted to its jurisdiction and will not enter a decree until the controversy over which it has no jurisdiction is disposed of or the advice of the Court of Appeals concerning the correctness of the decision bringing in new parties is obtained. The case is, in legal essence, no different from the Morris case. There the Court refused to go to a decree until a decision had been rendered in the State's court construing a State statute. Here the Court refuses to go to a decree until it has rendered a decision on a question over which it has no jurisdiction. In both cases there is a refusal to act for a cause insufficient in point of law.

The Judicial Code provides (Sec. 262):

> "The supreme court and circuit courts of ap-

> peal, and district courts, shall have power to issue all rights not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

In *ex parte Metropolitan Water Company* (220 U. S., 539), the lower court vacated a restraining order which it had no jurisdiction to vacate. There was no appeal from such order. The Supreme Court said:

> "This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction and the right of appeal is not otherwise given by statute."

It is obvious that if a cause cannot be kept in the lower court for all eternity by orders directing that there be litigated therein, matters over which the lower court has no jurisdiction, a writ of prohibition enjoining the enforcing of such an order and a writ of mandate compelling the entry of a proper decree are both authorized by the Judicial Code and by the decisions of the courts:

*Ex parte Metropolitan Water Co.,* 220 U. S., 539;

*Barber Asphalt Paving Co.* v. *Morris,* 132 Fed., 945;

*McClellan* v. *Carland,* 217 U. S., 268;

*In re Rice,* 155 U. S., 396;
*In re Dennett,* 215 Fed., 673.

THE CLAIM THAT EQUITY RULE 37 SANCTIONS THE MAKING OF AN ORDER SUCH AS THAT HERE MADE IS WITHOUT FOUNDATION.

Rule 37 provides: "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The clause of the Rule declaring that "any person may be made a party if his presence is necessary to a complete determination of the cause," does not give to the Court the power to make the person a party

upon its own motion, and without an amendment of the pleadings.

Statutes allowing parties to be brought in by the Court on its own motion have no such effect, for, as said in *Doke* v. *Williams* (34 So., 569):

> "To make a new defendant to a bill, claiming in a right not noticed by the bill, would throw the rules of chancery pleading into utter confusion, for it would be to try rights without any issue between the parties."

The rule, however, does not purport to authorize the Court to act on its own motion, or to set aside settled principles of equity. Indeed, the rule, by necessary implication, denies to the Court power to require the presence as a party of one not necessary to a proper and complete determination of *the cause presented by the pleadings.* Certainly the rule does not abrogate the rights granted by Rule 42, which provides:

> "Rule 42. JOINT AND SEVERAL DEMANDS—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

Rights created and recognized by rules of equity, such as this, are not abrogated even by rules author-

izing the addition of parties to a cause by the Court of its own motion:

THE RECEIVERS ARE NOT NECESSARY PARTIES TO THE APPEAL, NOR IS THE ORDER APPEALED FROM AN ORDER IN CONTEMPT. IT IS AN INJUNCTION.

On June 11, 1915, the District Court made an order reciting that the Receivers had filed in the court a contract between the Denver & Rio Grande and the Western Pacific Railway, together with other contracts, and asked six months' time to investigate all things in connection with the contract and to report this to the Court with their recommendations or advice. It is also recited that an action on Contract B has been commenced in New York against the Western Pacific and Denver & Rio Grande Railways, such action having been commenced on the 27th of May, 1915, It is further recited that on June 3rd, 1915, the Receivers filed a petition requesting instructions as to whether or not they should sue the Denver & Rio Grande Railroad on Contract B. It is then ordered that the Equitable Trust Company of New York appear before the Court on the 21st of June, 1915, and show cause, if any it has, why it should not be enjoined and restrained from further proceedings in the suit in New York. It is further ordered that in the meantime and until the hearing and determination of the order to show cause the Equitable Trust Company be restrained from further proceedings in the New York suit.

The foregoing matter appears in "Exhibit 19" of the Petition for Prohibition.

Prior to the hearing of the order to show cause the Equitable Trust Company filed its answer. The answer presented the primary objection that the order to show cause was not founded on any petition or pleading. The answer continued, declaring that the Court was wholly without jurisdiction to enjoin the complainant from proceeding on Contract B, declaring that the complainant had not sought, and did not seek by its suit in New York to do anything other than enforce the liability of the Denver & Rio Grande Railroad under Contract B; that the action pending in the District Court of California was an action to foreclose a mortgage and nothing else, and that the issuance of such restraining order would constitute an unlawful taking of property; that the complainant claims a right under the Constitution and Laws of the United States to select the forum in which it chooses to enforce its right under Contract B, and that this constitutional right was not surrendered by invoking the jurisdiction of the District Court of the United States for the Northern District of California by the suit in foreclosure. The answer sets up various other objections (See "Exhibit 20," Petition for Prohibition).

It is contended by counsel for the Receivers that they are necessary parties to the appeal from the injunction issued on this order to show cause, on the

theory that the order to show cause and the following injunction was made at their instance. Nothing in the record supports this contention, and the proceedings in the lower court completely negative it. Prior to the making of the order to show cause there came on for hearing in the lower court the Petition of the Receivers concerning instructions. At that hearing the pendency of the New York suit was mentioned and concerning that suit the Court said:

> "THE COURT—As I have indicated, I am very strongly of the view, from the reading of this contract, that the trustee is charged with the enforcement at least of these particular features of this contract; but the question which arises in my mind is whether or not that trustee having submitted the entire controversy to this court by asking its interposition in equity and for the appointment of a receiver has not subjected itself to the control of this court in directing when and perhaps in what form it shall proceed to enforce those rights; that is so that the administrative court may be able to see that it is being done under circumstances that will redound to the benefit rather than to the destruction of the property of the corporation."

The following colloquy also took place between Mr. Olney, one of the Receivers, and the Court:

> "MR WARREN OLNEY, JR.—If your Honor please, before Mr. Partridge proceeds I would like, if I might, to say a few words here not by way of arguing any legal proposition but as directing myself to the question of policy which is involved here. Mr. Partridge's views and my

own in regard to this matter of policy are not wholly in accord and I would like, if possible, to place my position in that respect before your Honor.

I have assumed all along that it was within the legal right of the trustee to maintain this suit; that is to say, the trustee either authorized by this court or otherwise could maintain the action. I have assumed also that it was probable that the Receivers themselves might maintain an action against the Denver & Rio Grande upon this guaranty. It simply became a question of policy as to whether or not the Receivers under those circumstances should themselves commence that suit.

"THE COURT—Well, of course, the Receivers would not and could not commence such a suit without the advice of the Court.

"MR. OLNEY—We have asked for instructions here not upon anything else but upon that very point, viz., as to whether or not the Receivers should be instructed to commence an action against the Denever & Rio Grande upon this guaranty. In that petition there is no recommendation as to what instructions should issue. Mr. Partridge has appeared here and apparently has urged that instructions issue that he commence the action—

"THE COURT—I do not understand Mr. Partridge to take that view. He simply asks upon the general instructions of the court. I do not understand you, Mr. Partridge, as urging that the court should direct the Receivers to commence this action

"MR. PARTRIDGE—On the contrary, if your Honor please,I specifically stated in the beginning that as representing the Receivers we were asking for instructions, not for any specific instructions.

"THE COURT—That was my understanding, Mr. Olney.

"MR. PARTRIDGE—I certainly had no in-

tention of in anyway representing to your Honor that the instruction they wanted was that one.

"MR. OLNEY—No, Mr. Partridge, and I did not intend to insinuate or to state that you stated that that was the instruction which the Receivers themselves wished. I said I thought that was your view of it.

"MR. PARTRIDGE—That is my personal view of it.

"MR. OLNEY—The view you have been urging upon the court here. That is as far as it went.

Now, so far as the dealings of the court with this trustee in New York is concerned, I have nothing whatever to say. If your Honor concludes that the trustee should have brought the suit here, or should be restrained from proceeding further with the suit there, that is nothing in itself and of itself concerns the Receivers and I have nothing to say about it. The point to which I wish to direct myself solely is the point I understood was up here in connection with the petition, and that is, as far as the petition itself certainly goes, the request for instructions as to whether or not the Receiver shall commence this action—

"THE COURT—I think you need not consume any time on that, Mr. Olney, because I certainly would not instruct the Receivers at this time to commence this action.

"MR OLNEY—Then I have nothing further to say, your Honor.

"THE COURT—And I did not understand that that was the request here. The prayer of the petition I see is as to whether they should be instructed.

"MR. OLNEY—That is the only point upon which we have requested instructions, if your Honor please, just that one thing."

Towards the conclusion of the discussion the Court said:

> " . . . In brief, my mind is firmly of this conviction: I cannot for a moment entertain the proposition that this court is so helpless in the administration of a great property of this kind under the bill that has been filed here so that it cannot control the action of any party connected with the suit, either directly or indirectly, with reference to litigation which involves the property or any of the subsidiary interests which are within the control of this court. I think that that power extends absolutely to the control and direction of the plaintiff in this cause, the Equitable Trust Company, as to not only the action which it has brought in New York but any other action which it might see fit to ask to bring."

And again the Court said, making the following order:

> "I am entirely without hesitation to the extent that I have indicated, that this court has jurisdiction of the plaintiff in that suit, and in the suit pending here, that is, the Equitable Trust Company, and that it can so exercise that jurisdiction as to require it to show cause here upon a given day. That will enable it to fully place before this court the whole subject matter as to its rights in the premises.
>
> "I will direct the attorney for the Receivers now to prepare an order along the general lines suggested here, and with proper recitals, directing the Equitable Trust Company, the trustee, to show cause here upon a given day why the action which has been brought in that district should not be dismissed or its further prosecution by the trustee

stayed until the further order of the court; and also that until that return day and a determination of the matter the trust company be restrained from taking any further step of any nature in that action. That will be the general nature of the order. I will sign such an order. And in order that responsibility may not be laid entirely upon Mr. How the order may be served upon Mr. How as the solicitor for the plaintiff in this district, but I would advise that the order be served immediately upon the Equitable Trust Company in New York."

On the hearing of the order to show cause the Court, speaking to Mr. Partridge, said:

"THE COURT—*I do not understand your suggestion as to the diversity of view between the Receivers. There cannot be any desire or wish on the part of the Receivers as to how the litigation shall go.*"

We have taken the liberty of quoting the foregoing extracts from the proceedings of the lower court for the purpose of demonstrating that nothing has been omitted from the record in this case, and that there is no basis for any claim that the order to show cause and the subsequent restraining order were made at the instance of the Receivers.

The contention that the proceeding was a proceeding in contempt as distinguished from the proceeding for an injunction arises from confusion. There is nothing in the record to show or indicate that the order, which on its face purports to be an injunction, was anything but an injunction.

The following extracts from the proceedings in the lower court at the hearing of the order to show cause show the attitude assumed by the Court on this question:

"MR. BOWIE—It seems to me that the one question which this court is considering at the present time is, was the Equitable Trust Company in contempt when it filed this bill in New York?

"THE COURT—Oh, no, not whether it was in contempt, that is, I mean in any sinister way.

"MR. BOWIE—I mean in contempt so as to authorize that further proceedings be enjoined.

"THE COURT—Was it justified in bringing the proceeding?

"MR. BOWIE—In other words, was it bringing a proceeding which legally could not be brought without the sanction of this court?

"THE COURT—That is putting it in another way. Was it authorized in bringing that action and prosecuting it without the direction of this court; *if it was not authorized it can be restrained from prosecuting that action, it can be required to dismiss it.*"

In other words, the proceeding is to restrain a suit commenced without authority. This is the character of the proceeding as fixed by the lower court.

"MR. PARTRIDGE—Now, surely, if your Honor please, the question as to whether or not the Receiver was the proper party to bring the suit was before this court; in other words, even if it be conceded that the Receiver had no right to bring a suit under Contract B still the Receivers had submitted to this court the question as to whether or not they had a right to bring that suit

and certainly any action in another jurisdiction which sought to foreclose that question was an interference with a matter that was brought before the court by its receivers.

"THE COURT—It is merely the corollary of the proposition that before bringing that suit it was the duty of the trustee to submit the question to this court for its direction."

The fact of the matter was that in this proceeding the Court was on its own motion asserting power to control the parties before it in collateral proceedings. The attitude of the Court being that expressed in the statement made on June 10th, the day before the order to show cause was written, when the Court declared:

"THE COURT— . . . In brief, my mind is firmly of this conviction: I cannot for a moment entertain the proposition that this court is so helpless in the administration of a great property of this kind under the bill that has been filed here as that it cannot *control the action of any party connected with the suit, either directly or indirectly, with reference to litigation which involves the property or any of the subsidiary interests which are within the control of this court.* I think that that power extends absolutely to the control and direction of the plaintiff in this cause, the Equitable Trust Company, as to not only the action which it has brought in New York but any other action which it might see fit to bring."

This proceeding was not a proceeding for contempt, though certain of the arguments advanced in favor of the jurisdiction of the Court to enjoin the

prosecution of the New York bill, viz., the argument that the subject-matter with which that bill dealt was in the possession of the Receivers would, had the same been asserted and upheld, have formed the basis of a contempt proceeding. The Court, however, did not see fit to bring a proceeding to punish for a contempt committed, but intend to assume direction and control over the future action of the Trustee, through injunctive process. Thus: the injunction itself, issued on the order to show cause, not only restrains the prosecution of the New York Bill, *but restrains the Trustee from doing any act which may in anywise affect or impair the obligations of Contract B or any of its provisions without first procuring the sanction of the Court.* IN OTHER WORDS, THE TRUSTEE IS RESTRAINED NOT ONLY FROM SUING IN NEW YORK, BUT ALSO FROM TERMINATING ALL PROVISIONS OF CONTRACT B, SAVE AND EXCEPTING THE PROVISIONS OF SURETYSHIP, THOUGH THE TRUSTEE IS BY THE TERMS OF HIS TRUST REQUIRED TO TERMINATE THESE PROVISIONS SHOULD TWO-THIRDS OF THE BONDHOLDERS ELECT SO TO DO AND NOTIFY IT OF THEIR ELECTION.

The claim that the order in question is an order punishing for contempt assumes that the injunction embodied in the order appointing the Receivers was sufficiently broad, either by express terms or by necessary implication, to prohibit the commencement of the suit in New York. Admittedly this is not the

fact, unless the suit in New York interfered with the property in the possession of the Receiver. If petitioners be correct—and no substantial argument is advanced to the contrary—the commencement of the suit in New York did not constitute an interference with the possession of the Receivers, and although the lower court was of a different opinion, it did not propose to rest its order on any such basis. *The lower court claimed the right to control the future conduct of the Trustee as well as the right to protect property in the possession of the Receiver. Accordingly, instead of making an order in the nature of a contempt order, it ignored the past, did not direct the Trustee to dismiss the bill, and made an order enjoining the Trustee from further prosecuting the suit in New York or taking any steps whatever under Contract B without the consent of the Court.* This order, if violated, would form the basis of a proceeding in contempt. It is admittedly broader in scope than the injunction contained in the order appointing Receivers and is, therefore, itself an injunction, not a contempt proceeding. Injunction is the proper and appropriate remedy by which to control the future conduct of a party and protect the jurisdiction of the Court from interference through the initiation of suits in other jurisdictions (See *Guardian Trust Co.* v. *Kansas,* 146 Fed., 340). Such injunctions are usually sought through the filing of a dependent bill, but here the Court, acting on its own

motion, bases the order on its order to show cause why such injunction should not issue.

## COMMENTS ON CERTAIN AUTHORITIES CITED BY RESPONDENT.

The case of *Lowe* v. *Blackburn* (87 Fed., 392), is cited as authority for the proposition that the Court in foreclosing the mortgage is at liberty to disregard the provisions of the mortgage and to conduct the foreclosure proceeding as it may see fit. This case does not lay down any such principle of law. It merely holds that the provisions of a mortgage governing the manner in which a sale of the mortgaged property shall be made by the trustee, are not binding upon the Court when a judicial sale takes place. It is, of course, true that the parties cannot by contract deprive the Court of the powers ordinarily incident to it in judicial proceedings, nor can they prescribe the mode in which a Court shall conduct a judicial sale.

The contention that when a court has taken possession of property by receiver it thereupon becomes enabled to require any controversy it may desire to be submitted to it, is utterly without support or authority. On the contrary, the settled rules of law apply to proceedings in which receivers are appointed as well as all other proceedings, the only exception being that claims to property in the possession of the receivers or to the possession of which the re-

ceivers are entitled must be litigated before the tribunal appointing the receivers. This, however, does not mean that the Court can require the parties to the action in which the receivers are appointed to litigate questions which they do not desire to litigate, and which do not involve title or right of possession to the property in the hands of the receivers.

The case of *Newton* v. *Gage* (155 Fed., 598), expressly recognizes this settled rule of law.

The case of *Mercantile Trust Company* v. *Atlantic and Pacific* (70 Fed., 518), merely declares that when property is in the possession of the receiver of the court the Court will not authorize action to foreclose a prior mortgage to be brought in another jurisdiction, but to require that such action be brought by cross-bill. The rule is, of course, eminently proper.

In closing, we desire to call the attention of the Court to the decisions of the Supreme Court of Michigan, a State in which a mortgagee is by statute given the express right to join the guarantor in an action of foreclosure. *In Vaughan* v. *Black and others,* the Supreme Court of Michigan said:

> ". . . It has been settled by repeated decisions of this court that it is not within the power of courts of chancery to grant absolute personal decrees against parties claimed to be collaterally liable for the mortgage debt in the original decree, and, if done, the decree is so far nugatory. The remedy is purely statutory, and

cannot be invoked until after a balance is reported unsatisfied . . ."

*Vaughan* v. *Black et al.,* 29 N. W. Rep., 523-4.

See also:

*Windsor* v. *Ludington,* 43 N. W. Rep., 867.

Respectfully submitted.

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